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No. 01-1127

Supreme Court U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; ERNEST B. ROE, Warden, *Petitioners-Appellees,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
CARL H. HORST
Supervising Deputy Attorney General
DOUGLAS P. DANZIG
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2285
Fax: (619) 645-2271
Counsel for Petitioners-Appellees

1288

QUESTIONS PRESENTED

1. Whether California's Three-Strikes Law, providing for a twenty-five years-to-life prison term for a third strike conviction, violates the Eight Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth amendment and proportionality in non-capital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years-to-life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court, within the meaning of 28 United States Code section 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub, L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

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ARGUMENT

I.

THE NINTH CIRCUIT'S RECENT DECISION IN THE CONSOLIDATED CASES OF *BROWN V. MAYLE* AND *YLST V. BRAY* SUPPORTS GRANTING THE PETITION FOR WRIT OF CERTIORARI

On January 29, 2002, this Court docketed Petitioner-Appellee's Petition for Writ of Certiorari in the instant matter (hereafter *Andrade*).[1/] On February 7, 2002, the Ninth Circuit issued its opinion in the consolidated cases of *Brown v. Mayle*,

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1. On March 1, 2002, Respondent-Appellant filed a brief in opposition. On March 13, 2002, the Petition was distributed for conference on March 29, 2002.

and *Ylst v. Bray*, 2002 WL 187415 (9th Cir. 2002) (hereafter *Brown/Bray*). (Supplemental App.) The Ninth Circuit's opinion in *Brown/Bray* followed, and expanded upon, its opinion in *Andrade v. Attorney General of State of California*, 270 F.3d 743 (9th Cir. 2001). Petitioner respectfully submits, the *Brown/Bray* opinion further demonstrates why certiorari should be granted in this case.

In *Andrade*, the Ninth Circuit held the Eighth Amendment prohibited punishing defendant Andrade by a sentence of fifty years to life for his two current convictions for petty theft with a prior theft-related conviction and time served (Cal. Penal Code, §§ 484, subd. (a), 486, and 666), where his criminal history consisted solely of non-violent offenses. The Ninth Circuit reasoned that the sentence was a much harsher penalty than the sentence in *Rummel v. Estelle*, 445 U.S. 263 (1980), because Rummel would have been eligible for parole in twelve years or less. The court in *Andrade* analogized the penalty to the sentence of life without possibility of parole in *Solem v. Helm*, 463 U.S. 277 (1983). Focusing on the "latest crime," *Andrade* concluded that shoplifting nine videotapes was comparable to the offense in *Solem* of uttering a no-account check. *Andrade* stated that since "the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony," using petty theft with a prior theft conviction to serve as the third strike creates a "unique quirk," allowing a defendant's recidivism to be "double counted." Finally, the *Andrade* court noted that "[w]hile the Supreme Court frequently defers to legislative judgments regarding the proper length of imprisonment for felony offenses, it is less clear that the same degree of deference is appropriate when extreme sentences are imposed for misdemeanor conduct." *Andrade*, 270 F.3d at 760.

In *Brown/Bray*, separate juries convicted each defendant of petty theft with a prior. Prior strike allegations against each defendant were also found true. The trial court

sentenced each defendant to prison for indeterminate terms of twenty-five-years-to-life, in accordance with California's Three-Strikes Law (Cal. Penal Code § 667, subds. (b) through (i)). Bray's prior strikes consisted of four robbery convictions. Two of them arose from one incident, in which Bray and a co-defendant stole a purse and a briefcase from the driver of a car. When the victim grabbed Bray, the co-defendant pointed a gun at her head and threatened to kill her if she did not let go. The victim complied, but the co-defendant fired three shots as the perpetrators fled the scene. In the third robbery conviction, Bray and several co-defendants approached the victim and demanded his watch. One co-defendant hit the victim in the face and took the victim's watch, a second co-defendant kicked the victim in the face when the victim fell to the ground and took five dollars cash. The *Brown/Bray* opinion does not specify the facts of Bray's fourth robbery conviction. It merely states that in 1987 Bray was again convicted of robbery. The opinion does not specify the facts underlying Brown's prior strikes either. It merely states Brown had five prior strikes, consisting of two second degree burglary convictions, two assault with a deadly weapon convictions, and a robbery conviction. (Supplemental App. at 5-6.)

The Ninth Circuit's opinion in *Brown/Bray* found the sentences in both cases violated the Eighth Amendment's prohibition against cruel and unusual punishment. The court found an inference of gross disproportionality, analyzed Brown's and Bray's cases from an intrajurisdictional and interjurisdictional perspective, and concluded they were materially indistinguishable from *Andrade*. Noting that the *Andrade* court held a sentence of fifty-years-to-life was grossly disproportionate to the crime and that the state court of appeal ruling was contrary to or an unreasonable application of this Court's clearly established precedent, the court in *Brown/Bray* held that although the circumstances before the court varied from *Andrade* in several respects, none of those differences

justified a different result than the one reached in *Andrade*. The Ninth Circuit rejected the state's argument that *Andrade* did not apply because the sentence was only half as long as the sentence in *Andrade*. The court said that if fifty-years-to-life in *Andrade* for two separate convictions was grossly disproportionate, it follows that twenty-five-years-to-life for one conviction was also grossly disproportionate. The *Brown/Bray* court further reasoned that although *Andrade* mentioned the petitioner's age at a possible parole date, the court in *Andrade* could not have meant the same sentence would have been acceptable for a younger person, or that a person with a limited life expectancy is entitled to a shorter sentence. The court said that the *Andrade* court's mention of the fact that Andrade could die before completing his sentence simply underscored the length of the mandatory sentence. (Supplemental App. at 18-30.)

The court also found it insignificant that both Brown and Bray had extensive criminal histories that included crimes of violence, stating that "the presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is non-violent." The court concluded that a twenty-five-years-to-life sentence for a defendant convicted of petty theft with a prior is cruel and unusual punishment, regardless of whether the defendant has an extensive criminal history that includes repeated crimes of violence and other offenses that have harsh potentialities for violence. The court also held that the state courts' rulings upholding the sentences were "contrary to" and "unreasonable application[s] of" clearly established United States Supreme Court precedent within the meaning of section 2254(d)(1). (Supplemental App. at 31-37.)

As is plainly evident, much like the opinion in *Andrade*, the *Brown/Bray* opinion is a result-oriented decision. Moreover, it demonstrates the Ninth Circuit is using *Andrade* as a springboard to deviate even further from both this Court's relevant decisions and the standard of review prescribed by

Congress for federal habeas cases reviewed pursuant to 28 United States Code section 2254. Despite the fact that the Ninth Circuit tried to limit its holding in *Andrade* to its "unusual circumstances" (*Andrade*, 270 F.3d at 767), the opinion is being used as a sword to attack sentences that have little, if anything, to do with *Andrade's* unique facts. State-wide, Petitioner's office is receiving a number of orders from magistrate judges, district courts, and the Ninth Circuit, for briefing on the *Andrade/Brown/Bray* line of cases, including orders for an interjurisdictional analysis when the third-strike is a crime other than petty theft with a prior. In one particularly curious case, petitioner's office has been ordered to provide an interjurisdictional and intrajurisdictional analysis in light of *Andrade/Brown/Bray* in a case where the prior strikes are attempted kidnaping and robbery, and the third-strike is second degree murder (*Andre Eric Watson v. E. Roe, Warden*, Case No. CV 00-4205-MMM (MAN)).

The *Andrade/Brown/Bray* line of cases has also resulted in an intolerable tension between the state and federal courts. *Andrade* and its progeny have suggested that all third-strike sentences in California are vulnerable to reversal on an Eighth Amendment challenge, regardless of the nature of the prior strikes or of the third-strike conviction. At the same time, however, contrary to the core holdings in *Andrade/Brown/Bray*, a number of state courts of appeal have held the imposition of a twenty-five-years-to-life sentence on a defendant whose third strike conviction is for a low-grade felony and whose criminal record does not include a history of violence, does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *People v. Goodwin*, 59 Cal. App. 4th 1084, 1093-94, 69 Cal. Rptr. 2d 576 (1997); *People v. Cooper*, 43 Cal. App. 4th 815, 820-26, 51 Cal. Rptr. 2d 106 (1996); *People v. Barrera*, 70 Cal. App. 4th 541, 556, 82 Cal. Rptr. 2d 755 (1999). California's sentencing courts are not bound to the Ninth Circuit's decisions, but are bound to the decisions of the

state's courts of appeal. Thus, in many cases, California's sentencing courts are placed in the unreasonable position of having to consider whether they should impose an indeterminate life sentence or exercise their discretion to dismiss strikes in order to achieve a less harsh sentence, knowing full well that if they choose not to dismiss strikes, that exercise of discretion will pass state muster but is virtually certain to be reversed on federal habeas corpus review. The reasonable inference is that as a result, California's sentencing courts may be influenced, subtly or subconsciously, to exercise the discretion the People of the State of California endowed them with, in a manner that will simply avoid the inevitable.

In sum, the *Andrade* opinion's failure to properly apply this Court's jurisprudence concerning Eighth Amendment proportionality challenges, its failure to be guided by the criteria presented in this Court's most recent relevant opinions, and its failure to accord the state court determination due deference, has spawned a line of cases that continue to conflict with the relevant decisions of this Court on an important federal question. Moreover, the opinion undermines the balance Congress struck between the state and its courts on one hand, and the federal courts on the other and, in the process, threatens to unduly affect the discretion the People of California, by their duly elected Legislature, have vested in the sentencing courts. In addition, if allowed to stand, the opinion is likely to result in even greater mischief, as it has opened the floodgates of litigation to unprincipled federal review of thousands of sentences in California. Accordingly, petitioner respectfully submits the Ninth Circuit's opinion in *Brown/Bray* further supports petitioner's petition for writ of certiorari in the instant matter, and requests the writ be issued.

CONCLUSION

For the foregoing reasons, Petitioners-Appelles request that the writ be issued.

Dated: March 29, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

CARL H. HORST
Supervising Deputy Attorney General

DOUGLAS P. DANZIG
Deputy Attorney General
Counsel of Record

Counsel for Petitioners-Appellees